

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: M.D.	:	APPEAL NO. C-160509
	:	TRIAL NO. F06-1194X
	:	
	:	<i>JUDGMENT ENTRY.</i>

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Appellant, the guardian ad litem (“GAL”) for the child M.D., appeals the juvenile court’s judgment adopting the magistrate’s decision which denied the GAL’s motion for permanent custody and accepted the request by appellee, Hamilton County Department of Job and Family Services (“HCJFS”), to award legal custody of M.D. to the child’s aunt, appellee K.N.

When M.D. was born in March 2006, she and her mother tested positive for cocaine. In June 2006, the Hamilton County Juvenile Court awarded legal custody of M.D. to K.N. M.D. remained in K.N.’s care until April 2012, when K.N. was arrested for murder. M.D. and K.N.’s son, J.N., were moved to another relative’s home.

Approximately a month later, in May 2012, K.N. was released from jail. A safety plan was put in place by HCJFS. In June 2012, K.N. executed a voluntary agreement for care of M.D. and J.N. in favor of HCJFS, and the children were placed

in foster care. In July 2012, K.N. pled guilty to reckless homicide and was placed on three years' community control. HCJFS was granted interim custody of M.D.

In October 2012, M.D. was adjudicated dependent and was committed to the temporary custody of HCJFS. In May 2013, the juvenile court granted an extension of temporary custody.

In October 2013, HCJFS filed a motion to modify temporary custody to permanent custody. However, in January 2014, HCJFS withdrew its permanent-custody motion and sought a second extension of temporary custody.

Following a hearing on January 28, 2014, a juvenile court magistrate noted in his decision that the parties, including K.N., her attorney, the child's HCJFS caseworker, an attorney representing HCJFS, and the child's GAL, had stipulated that K.N. had "actively engaged in substance abuse treatment" by completing inpatient and aftercare treatment, and that K.N. was "also attending individual counseling with favorable report from [the] therapist." The magistrate determined that an additional extension of temporary custody to HCJFS was in M.D.'s best interest, noting that K.N. had made substantial additional progress towards reunification.

Then, in April 2014, HCJFS moved to terminate temporary custody and to remand custody of M.D. to K.N. The GAL filed a motion to modify temporary custody to permanent custody to HCJFS.

In July 2014, the GAL requested that the juvenile court appoint independent counsel for M.D., because M.D.'s expressed wishes differed from what the GAL believed to be in M.D.'s best interest. In August 2014, K.N. filed a motion to remand custody of M.D. to her.

In July and September of 2015, the magistrate conducted hearings on the GAL's permanent-custody motion and on the motions by HCJFS and K.N. for custody to be remanded to K.N. HCJFS, K.N., and the child, through the child's

attorney, all opposed the GAL's motion. As noted by the magistrate, this case presented an "unusual posture" because the GAL sought an award of permanent custody to HCJFS, over the objections of HCJFS and the child.

After considering extensive testimony and evidence, the magistrate concluded that an award of legal custody to K.N. was in M.D.'s best interest. He denied the GAL's motion to modify temporary custody to permanent custody, terminated temporary custody, and remanded legal custody of M.D. to K.N. The juvenile court overruled the GAL's objections and adopted the magistrate's decision.

The GAL appealed the juvenile court's judgment denying the motion for permanent custody and awarding legal custody to K.N. After the juvenile court denied the GAL's motion for a stay, the GAL moved this court for a stay of the juvenile court's judgment pending the outcome of this appeal. We granted the stay.

An award of permanent custody to HCJFS must be supported by clear and convincing evidence, that is, evidence that produces a firm belief as to the facts sought to be established. *In re W.W.*, 1st Dist. Hamilton Nos. C-110363 and C-110402, 2011-Ohio-4912, ¶ 46. In this case, the juvenile court did not award permanent custody to HCJFS. It found that the GAL had not established by clear and convincing evidence that permanent custody should be awarded to HCJFS.

In a single assignment of error, the GAL argues that the juvenile court's finding that it was in the best interest of the child to remand custody to the child's aunt was contrary to the weight of the evidence. The GAL contends that the child's best interest would have been served by an award of permanent custody to HCJFS.

R.C. 2151.414 governs the procedures a juvenile court must follow and the findings it must make on a motion for permanent custody. *Id.* at ¶ 47. We will apply the version that was in effect on the date that the motion for permanent custody was filed, which in this case was May 1, 2014. See *In re C.E.1*, 1st Dist. Hamilton No. C-140674 (Mar. 20, 2015); *In re C.M.*, 1st Dist. Hamilton Nos. C-150365 and C-150396,

2015-Ohio-3971, ¶ 13. A court may grant permanent custody of a child to a public children services agency if the court finds by clear and convincing evidence that permanent custody is in the child's best interest and that one of the four conditions in former R.C. 2151.414(B)(1) is met. Former R.C. 2151.414(B)(1) and (D)(1); *In re W.W.* at ¶ 48.

In this case, the court found that the condition in former R.C. 2151.414(B)(1)(d) had been satisfied because the child had been in the temporary custody of HCJFS for nearly 36 months. The GAL acknowledges that the condition in subsection (d) was satisfied in this case, but contends that if the juvenile court had chosen to consider whether the condition in subsection (a) was satisfied, the court reasonably could have found that, based upon the evidence, the child could not or should not be placed with the child's parents or with K.N., as the prior legal guardian. However, under the plain language of subsection (a) of former R.C. 2151.414(B)(1), that subsection "is only triggered when none of the remaining three subsections are triggered." *In re Damron*, 10th Dist. Franklin No. 03AP-419, 2003-Ohio-5810, ¶ 9. Consequently, the juvenile court was not required to find that the child could not or should not be placed with the child's parents within a reasonable time, pursuant to former R.C. 2151.414(B)(1)(a), and properly determined this element under subsection (d). *See id.*

Upon its determination that the condition in former R.C. 2151.414(B)(1)(d) was satisfied, the juvenile court considered the child's best interest, pursuant to former R.C. 2151.414(D)(1). In assessing the best interest of a child, the court must consider "all relevant factors," including: (1) the child's interaction and interrelationship with parents, siblings, relatives, foster caregivers, out-of-home providers, and any other person who may significantly affect the child; (2) the child's wishes; (3) the custodial history of the child; (4) the child's need for a legally secure permanent placement and whether that can be achieved without a grant of

permanent custody; and (5) whether any of the factors in former R.C. 2151.414(E)(7) through (11) apply in relation to the parents and the child. Former R.C. 2151.414(D)(1)(a)-(e); *In re K.G.*, 1st Dist. Hamilton Nos. C-150013 and C-150014, 2015-Ohio-2383, ¶ 16.

In this case, the juvenile court heard testimony by numerous mental-health providers, HCJFS caseworkers, J.N.'s guardian ad litem, M.D.'s former guardian ad litem, M.D.'s former speech therapist, and a developmental nurse practitioner. In addition, the court considered various exhibits, including mental-health records for K.N., J.N., and M.D., communications by J.N.'s and M.D.'s therapists, criminal records of M.D.'s mother and K.N., juvenile court records for J.N., and visitation records from HCJFS and from the Family Nurturing Center.

The court noted that M.D.'s father was deceased, and that her mother was an unsuitable custodian due to her lack of involvement with M.D. and her criminal and substance-abuse history. The court indicated that, at the time M.D. entered the care of HCJFS in 2012, she had lived with K.N. for six years with no allegations of abuse or neglect. The court found that K.N. had initially pled not guilty to the homicide charge and had intended to present an affirmative defense of self-defense. After pleading guilty to reckless homicide in 2012, K.N. was placed on community control and successfully discharged from community control in July 2015.

The court acknowledged that K.N. had been initially reluctant to comply with the reunification plan, leading HCJFS to file for permanent custody in October 2013. But, the court noted, a new caseworker was assigned to K.N., and K.N. began to comply with reunification services. In addition, K.N. had completed substance-abuse treatment and had maintained her sobriety. The court further found, as argued by HCJFS, that K.N. had made sufficient progress in mental-health treatment and that she had been successfully discharged from counseling by her therapist.

While there were some issues about the relationship between M.D. and J.N. and the potential for violence, the court noted that J.N. had been returned to K.N.'s custody in October 2014 and that K.N. had been compliant with the services provided by various agencies for J.N.'s significant special needs.

The court found that, despite the GAL's objections, HCJFS had advocated the return of M.D. to K.N.'s home because K.N. had successfully completed case-plan services and community control, had engaged in positive ongoing day visits, and had been cooperative with J.N.'s service providers. In addition, the court noted that M.D. had expressed a strong desire to return to K.N.'s care, and that the HCJFS caseworkers had testified to the "strong and positive mutual bond" between M.D. and K.N.

The child's interactions with K.N. were positive, and the child's interaction with J.N. caused no concern to the HCJFS caseworkers. The child wished to be returned to K.N.'s custody. Until the child was six years old, K.N.'s home was the only one the child had lived in, and HCJFS had not become involved until K.N. had been arrested on the homicide charge. K.N. had completed mental-health and substance-abuse treatment, as well as her three-year community control. Most notably, the HCJFS caseworkers were fully supportive of a remand of custody to K.N.

After reviewing the record, we hold that there was competent and credible evidence to support the juvenile court's decision that the GAL had not established by clear and convincing evidence that a grant of permanent custody to HCJFS was in the child's best interest. *See In re K.G.*, 1st Dist. Hamilton Nos. C-150013 and C-150014, 2015-Ohio-2383, at ¶ 25.

Moreover, competent, credible evidence supported the juvenile court's finding that it was in the child's best interest to award custody to K.N. *See In re Patterson*, 1st Dist. Hamilton No. C-090311, 2010-Ohio-766, ¶ 15. Therefore, the court did not

abuse its discretion in awarding custody to K.N. *See id.* at ¶ 20. Accordingly, we overrule the assignment of error and affirm the juvenile court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS, P.J., MYERS and GORMAN, JJ.

ROBERT H. GORMAN, retired, from the First Appellate District, sitting by assignment.

To the clerk:

Enter upon the journal of the court on April 7, 2017

per order of the court _____.
Presiding Judge